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Current Topics.

Defence Regulations: Habeas Corpus Application.

THE decision of the court refusing an application for a writ of *habeas corpus* in *Re Lees* has already been noticed in these columns, but, as the case raises important questions of constitutional and topical interest, some indication of the reasons which led the court to refuse the application should be briefly indicated. These reasons were given on Monday and reported in *The Times* of the following day. The judgment of the court was delivered by HUMPHREYS, J., who said that the first ground of objection to the Home Secretary's order for the applicants' detention was that it was bad for duplicity in that the two allegations of membership of, and activity in connection with the objects of, an organisation (the British Union of Fascists) were stated in the alternative; that these afforded separate grounds for making the order; and that one or other, or both of them, should appear as the reason for making the order. There was nothing in that point. The order, which followed strictly the language of the regulation (Defence (General) Regulations, 1939, reg. 18B (1A)), was not a conviction nor an indictment, nor even a charge; and there was nothing in the statute or the regulations requiring that the order should be in any particular form. His lordship then went on to deal with the second point that had been raised. This was to the effect that the order was invalid because the Home Secretary never had any reasonable cause to believe that the applicant was a person to whom the regulation applied. The learned judge intimated that on an application for a writ of *habeas corpus* the court undoubtedly had power to inquire into the validity of the order of detention and for that purpose to ascertain whether the Home Secretary had reasonable cause for the belief expressed in the order. But the Home Secretary was bound to act on information supplied to him by others, and that information was necessarily confidential. The disclosure of it to the applicant and the public, together with the identity of the informants, might well be highly prejudicial to the interests of the State. Reference was made to an affidavit by the Home Secretary stating that he had carefully considered the matter and had come to the conclusion that there was clear ground for believing, and that he sincerely believed, that the applicant was a person to whom the above cited regulation applied. The court, it was said, accepted those statements and was satisfied that the Home Secretary had reasonable cause for believing that the applicant was a person to whom the regulation applied.

Air Raid Damage: Dwelling-houses.

THE Minister of Health recently answered a number of questions in the House of Commons in regard to the powers of local authorities concerning dwelling-houses and assistance to persons affected by the same. Local authorities, he said, were responsible for carrying out repairs immediately necessary to avoid danger to health in the case both of houses on their own estates and houses of which the owners were unable or unwilling to take action. Responsibility for immediate assistance to persons concerned, however, rested with the public assistance authorities which had made arrangements, including the provision of food and shelter for a short period, and, where necessary, temporary billeting. Where houses had been destroyed outright or were too badly damaged to be repairable and the families found it difficult to obtain accommodation, local authorities had been given special powers to take possession of houses or other buildings which could be made suitable for housing, and to let them at reasonable terms. The normal method was for officials of a local authority to visit the places where there were damaged houses as soon as possible after the incident, make appropriate inquiries, and so find out very quickly whether an owner was willing to do repairs or not. Mr. MALCOLM MACDONALD intimated that he was satisfied that the plans adopted were working very well, and said that if there were individual cases of complaint he would be glad to bring them to the notice of the local authority concerned. The expenses of repairs effected by the local authorities were charged on the owner of the property and regarded as a loan on which interest was not charged during the war and in regard to which no payment was required during the war. The Government gave assistance with regard to the raising of loans in order to carry out these repairs; while, as regards expenditure incurred by public assistance authorities for the above-mentioned matters, there was no limit. Where people had been evicted owing to the presence of time bombs or unexploded bombs, it was the responsibility of the local authority that such people should be looked after in a similar way to people whose houses had been damaged or destroyed.

War Damage to Property: A Compensation Pool.

A SUBSCRIBER has favoured us with the copy of a letter which he has sent to the Prime Minister on the subject of war damage to property. It is pointed out that compensation for such damage cannot be effected by insurance because there is no actuarial or statistical basis on which premises could be assessed; but it is urged that provision could very simply be made by all property owners pooling their resources under the ægis of the Government by submitting, as they all would very gladly, to pay, say, an additional 10 per cent. to the Sched. A income tax. The Office of Works could then undertake the repair or rebuilding of all damaged property and, by a centralised mass production organisation, could do the work either directly or by sub-contractors more economically than could any individual property owner. It is suggested that the percentage addition to the Sched. A tax might be known as the Property Compensation Pool Tax and that it would be continued so long as might be necessary to recoup the expenditure incurred, and that it would remain a charge on all properties notwithstanding interim changes of ownership. The additional percentage would be payable

during such periods as the Sched. A tax was not payable by reason of " voids " claims. The Government scheme for the provision of compensation after the war is criticised on the grounds that it is vague and uncertain both as to time and amount; that it provides no immediate relief; and that it involves, in effect, contribution from those who are not property owners. It will be remembered that the matter was dealt with by the Prime Minister in his statement on the war situation in the House of Commons some time ago. He recalled that during August about 800 houses had been destroyed through air raids—very different from the estimate of damage given to the Weir Committee which decided against the possibility of an insurance scheme against air raid damage to property. Mr. CHURCHILL said that in his judgment it would be worth while for a further examination to be made of such a scheme, particularly as it would affect the small man, and to make that examination in the light of the facts now known and also of future possibilities. As to the formation of an opinion concerning the latter, the position, it was intimated, had greatly improved since the war began. The Prime Minister stated that he had, therefore, asked the Chancellor of the Exchequer to consider the best way of making such a review in the light of the facts of the present day.

War Damage to Chattels.

THE Prime Minister recently stated in the House of Commons that it was proposed to abolish the limits of £50 and £30 in regard to payments for loss of, respectively, essential household furniture and clothing where the income of a claimant's household does not exceed £400 where there are dependents or £250 where there are no dependents. Payments for air-raid damage to persons of limited means would be made up to 100 per cent. of the damage, whatever the amount might be. He also stated that it was proposed to remedy the hardship due to the fact that there had been no provision to enable workmen to replace tools which were their personal property and the use of which was vital to their employment. Provision would be made for payment to those whose incomes were within the limits prescribed in the case of clothing allowances, and similar payments would be made to professional men within the same limits of income. Payments up to £50 would, it was indicated, also be made to small retailers not insured under the Board of Trade Commodities Insurance Scheme (subject to the same income limits) to enable them to replace stocks essential to the continuance of trade. In these three cases appropriate mitigating measures would be taken in borderline cases lying just above the income limits.

Evacuation Areas: Loss of Business.

The Times Parliamentary correspondent recently indicated that in addition to the measures announced on 5th September by the Prime Minister for improving the compensation payable in respect of loss of property and goods in air-raids, and giving financial assistance to local authorities in areas within the Defence (Evacuation Areas) Regulations, the Government still had under consideration the problem of persons in evacuation areas who were suffering distress through loss of their businesses or other means of livelihood. Reference is made to a statement made by Mr. ATTLEE in answer to questions in the House of Commons in which it was indicated that a full investigation was being made into the matter, but that it was not yet complete. Meanwhile a number of members have tabled in the House of Commons for debate on an early day a motion to the effect that the House, while welcoming the Government's expressed intention to assist where necessary the finances of local authorities in areas affected by evacuation, is of the opinion that provision should be made for dealing with the position of individuals whose means of livelihood has been compromised or destroyed through the same causes.

The Personal Injuries (Civilians) Scheme, 1940.

A USEFUL leaflet has recently been issued by the Ministry of Pensions concerning the revised Personal Injuries (Civilians) Scheme, dated 23rd July, 1940 (S.R. & O., 1940, No. 1307). The leaflet supplements the Ministry's circular S.S. 143, which was issued to local authorities on 14th September, 1939, and supersedes para. 4 (*b*) of that circular which referred to the now revoked Personal Injuries (Civilians) Scheme of 1939. It is pointed out that regular employees of a local authority (other than civil defence volunteers) are affected by the scheme in so far as they are " gainfully employed " and are thus eligible for compensation in respect of war injuries. Superannuation arrangements remain unaffected by the scheme. With reference to regular employees of local authorities engaged on full-time or part-time civil defence work but not enrolled as members of civil defence organisations recognised under the First Schedule to the scheme, attention is drawn to the definition of " war service injury," from which it is clear that evidence is required, not only that an injury arose out of and in the course of the performance by the volunteer of his duties as a member of the organisation to which he belonged at the time, but also that the injury did not arise out of and in the course of his employment in any other capacity. In the majority of cases, it is stated, injuries sustained by such persons in the course of their employment would be covered by the existing workmen's compensation or superannuation arrangements. In regard to the personnel of civil defence organisations in general, it is pointed out that, while the responsibility for setting up, maintaining and controlling such organisations may rest with the local authority, compensation for injuries sustained in the course of their employment is provided for under the scheme which is designed in this respect to take the place of the Workmen's Compensation Acts. The importance of proper enrolment of civil defence volunteers is stressed in connection with the statutory bar imposed by s. 3 of the Personal Injuries (Emergency Provisions) Act, 1939.

War Service Injuries.

THE leaflet contains a note concerning the circumstances in which a civil defence volunteer may or may not be regarded as having been on duty when an injury was sustained. The period of duty, it is said, is normally regarded as starting from the time when the volunteer attends and reports to his organisation for duty, and as terminating when that duty ceases. If, however, an emergency call to report for duty had been received—whether in the form of an air-raid warning or any other pre-arranged system—the volunteer would be regarded as covered for the purpose of " war service injury " from the time of leaving the place at which the emergency call was received. The leaflet draws attention to the fact that the civil defence organisations in the First Schedule to the scheme are described by reference to the purposes for which they have been established, and it is emphasised that injuries can only be certified as " war service injuries " if they can be shown to have arisen out of and in the course of the performance by the injured person of his duty as a member of an organisation established for such a purpose. Certain activities—such as where, for training purposes, the A.F.S. is ordered to assist in dealing with fires not caused by enemy action—have, however, been recognised as coming within the purposes specified in the schedule (although not expressly mentioned therein), and injuries sustained in such cases will be regarded as eligible for consideration as " war service injuries." Another important consideration to which attention is directed is that the only basis on which compensation can be granted under the scheme for " war service injuries " is through membership of a civil defence organisation specified in the First Schedule. It is therefore essential, the leaflet states, for the proper working of the scheme that the civil defence services to be covered shall be so organised as to conform to the requirements of the schedule and that the members should know that they are members. The leaflet concludes with some useful notes on the First Schedule.

Recent Decisions.

IN *Wood* v. *London County Council* (*The Times*, 6th September), TUCKER, J., held that the kitchen of a mental hospital belonging to a local authority was a factory within the Factories Act, 1937, and that a meat-mincing machine was not securely fenced as required by s. 14 of the Act, but his lordship gave judgment for the defendants in an action for damages in respect of personal injuries sustained by the plaintiff when operating the machine on the ground that she had been guilty of contributory negligence.

In *W. W. Howard Brothers and Co., Ltd.* v. *Kann* and *Forestal Land, Timber and Railways Co., Ltd.* v. *Rickards* (*The Times*, 7th September) Hilbery, J., held that underwriters were not liable, either on the footing of constructive total loss or actual total loss, for the loss of cargo belonging to British owners which had been on board German ships at the outbreak of war and had been lost when the ships were scuttled in accordance with orders given by the German Government to avoid capture. A similar conclusion was reached in *Middows, Ltd.* v. *Robertson*, where the ship reached a German port.

In *Horsman* v. *Horsman* (*The Times*, 7th September) the Court of Appeal (MACKINNON, CLAUSON and GODDARD, L.JJ.) upheld a decision of HODSON, J., dismissing a wife's petition for dissolution of marriage on the ground that the husband's domicile was India, and that the English courts had no jurisdiction to try the suit.

Criminal Law and Practice.

The Defence Regulations and the Sale of Food.

Occasional temporary scarcities in non-essential articles of food are a potential source of friction between provision dealers and would-be purchasers. Although the former feel, with some moral justification, that it is unfair that they should be bound to supply casual purchasers with commodities of which they have a limited supply, to the detriment of their more regular customers, it is as well that they should be made to understand the risks of criminal liability which they may run if they attempt to attach conditions to the sale of any article of food.

The question first arose shortly after the outbreak of war, when there was some apprehension that provision dealers would refuse to supply unrationed foods to persons who were not registered with them for rationed foods. An Order was promptly made under reg. 55 of the Defence Regulations on 6th September, 1939 (the Food (Conditions of Sale) Order, 1939, S.R. & O., 1939, No. 1103). This defines "article of food" for the purposes of the Order as any article used as food or drink for human consumption other than water and it includes any substance which ordinarily enters into or is used in the composition or preparation of human food, any flavouring matter or condiment, tea, coffee and cocoa.

The Order provides that, except under the authority of the Board of Trade, no person shall in connection with the sale or proposed sale of any article of food impose or attempt to impose any condition relating to the purchase of any other article.

Infringements of the Order are offences against the Defence Regulations, 1939. Under reg. 92 of those regulations the penalty on summary conviction for a breach of the regulations is imprisonment for a term not exceeding three months or a fine not exceeding £100, or both, or on indictment, imprisonment for a term not exceeding two years or a fine not exceeding £500, or both. Under reg. 93 no prosecution for a breach of the Defence Regulations may be instituted otherwise than either by a constable, or by or with the consent of the Director of Public Prosecutions. This is without prejudice to any special provision in any regulation. There is no special provision in reg. 55 or in the Food (Conditions of Sale) Order, 1939.

An interesting case under the Order occurred at Bury St. Edmunds on 1st August, 1940. The defendant had exhibited the notice "No sweetened milk unless you buy a shillingsworth of goods." A child had entered the defendant's shop and asked for a tin of milk. The defendant pointed out the condition and the customer accordingly made no purchase. The defendant said that his supplies were limited and in order to be fair to his own customers he could not part with the milk to other persons' customers. It was said that he had removed the notice as soon as it had been questioned, and that the customer in question had already obtained far more than her normal requirements of the commodity. As the case was not serious a fine of 10s. was imposed, with 3s. costs.

If the attempt to impose a condition had not been clearly proved, it would certainly have been a good defence to show that the shopkeeper withheld supplies because the customer had already in his possession or under his control the normal quantity of the commodity in question. Under the Acquisition of Food (Excessive Quantities) Order, 1939 (S.R. & O., 1939, Nos. 991 and 1419), no person shall, except under the authority of a licence granted by the Ministry of Food, acquire any article of food, if by so doing the quantity thereof in his possession or under his control in the United Kingdom, exclusive of such part thereof as was acquired by him before the coming into force of the Order (31st August, 1939), shall exceed the normal quantity required by him. This restriction of course does not apply to the acquisition in the ordinary course of business of any article of food by a person carrying on the business of a producer, dealer, manufacturer, carrier or warehouseman. It is also provided that no person shall dispose of any article of food to another person if he knows, or ought reasonably to be presumed to know, that by reason of such disposal the quantity of such article which may lawfully be acquired by that other person will be exceeded. "Article of food" has the same definition as in the Food (Conditions of Sale) Order, 1939, except that the word "drink" is omitted (see above), and "normal quantity" means in relation to the quantity of any article of food required by any person, such quantity as would be required for use and consumption in the household or establishment of that person during a period of seven days or such longer period as ought fairly to be allowed in view of the existence of any special circumstances. Infringements of this Order are also offences against the Defence Regulations.

The shopkeeper would therefore not only be entitled, but bound, to refuse to supply an intending purchaser in breach of this Order. He cannot, however, at the same time intimate that he is willing to infringe the Order for a consideration, namely, that the intending purchaser should take other goods from him. Whether he is entitled to refuse to supply particular persons when stocks are exhibited for sale has always been a moot point, but the balance of reliable opinion seems to be against this view. It is doubtful whether shopkeepers can institute any private rationing scheme without some risk of an unintelligent assistant bringing them within the provisions of the Order. Even assuming that a dealer is entitled to refuse to supply a person with goods which are manifestly exhibited for sale, it should be borne in mind that it is an offence to attempt to impose a condition of the sort mentioned in the Order. Consequently, if evidence were forthcoming of a continuous practice by any shopkeeper to supply a particular commodity only to customers who bought other goods, and of the fact that this practice was known to purchasers, this would probably be sufficient ground for a successful prosecution.

Other evasions of the Food (Conditions of Sale) Order which have been attempted by dealers have been the exhibition of a notice on a given stock of food to the effect that that stock is reserved for registered customers, or the exhibition of a conspicuous notice that a given commodity will be supplied to "customers." No explanation is necessary to show that these practices are clear breaches of the Order, and consequently of the Defence Regulations.

It only remains to add, and it is important to do so in these days of multiple grocer shops, that under reg. 91 of the Defence Regulations, where a person convicted of an offence against any of the regulations is a body corporate, every person who, at the time of the commission of the offence, was a director or officer of the body corporate shall be deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge, or that he exercised all due diligence to prevent the commission of the offence. The normal rule of law is that the onus is on the prosecution to prove its case to the satisfaction of the jury, and the rule as set out in reg. 91 shifts that onus in prosecutions under the Defence Regulations. A similar removal of the onus of proof to the shoulders of a director defendant where a body corporate is convicted of an offence is to be found in s. 29 of the Betting and Lotteries Act, 1934, in respect of offences under that Act. This minor abrogation of the normal rule as to the onus of proof does not in any way diminish the vitality of the maxim of English law that every person is innocent until he is proved guilty, but rather is intended to instil into the minds of company directors the need for the utmost vigilance in dealing with matters of such fundamental public importance as those dealt with in the Defence Regulations.

Wills of Men in the Forces.

The nature and extent of the privilege of making informal wills accorded by English law to soldiers on active service and sailors at sea has assumed an increasing importance in each of the major wars in which this country has during the twentieth century been involved, and in view of the present great increase in the armed forces of the Crown and the fact that they include persons in all ranks of society, there is certainly no reason to think that the present emergency will be any exception.

The privilege, as was shown by Sir H. Jenner Fust in the leading case of *Drummond* v. *Parish* (3 Curt. 522) was borrowed from the Roman law. "It appears," he says, "from the preface to the life of Sir Leoline Jenkins that he claimed some merit for having during the preparation of the Statute of Frauds obtained for the soldiers of the English army the full benefit of the testamentary privileges of the Roman army," and consequently, "in order to ascertain the extent and meaning of the exception in the Statute, the civil law may fairly be resorted to."

But though reference to the Roman law is permissible both on matters of principle and system (as, e.g., in the judgment of Younger, J., as he then was, in *In re Wernher* [1918] 1 Ch. 339), yet it seems clear that the extent of the privilege is not in all respects to be measured by that law. Lord Merrivale, in *Re Booth; Booth* v. *Booth* (42 T.L.R. 454), pointed out that in s. 23 of the Statute of Frauds there is not a word of incorporation of the Roman civil law, and that that Act and s. 11 of the Wills Act, 1837, merely preserved for soldiers and sailors the privilege which was common to English subjects of making informal testamentary dispositions. The learned President accordingly declined to hold that the

limitation said to subsist in the Roman law whereby a soldier's will became inoperative after twelve months applied to an English soldier's will. And it seems now to be well established that the only phrase in the Statute which appears to have been borrowed from Roman law, viz.: "In actual military service," is to be interpreted somewhat more widely than its prototype "*in expeditione*" (cf. the note in "Swinburne on Wills," 3rd ed., p. 93).

The reason for the exception is quaintly stated by Swinburne to be that soldiers being "better acquainted with weapons than books are presumed to have so much the less knowledge of the laws of peace by how much they are the more expert in the law of arms; forasmuch also as noble warriors in the defence of their country undertake perilous enterprises wherein they lose their lives or limbs and seldom escape without wounds or bodily hurts." It is, however, well settled that it is not essential to prove that the soldier is in the particular circumstances *inops consilii*, and that it is immaterial that he has expert legal advice available. Even if the will has been prepared by a solicitor and is attested as required by the Wills Act, it will be entitled to the privilege, provided it be made on actual service.

In *In re Limond* [1915] 2 Ch. 240, it was considered necessary to adduce evidence of the testator's intention to make a privileged will in order to prevent a gift to an attesting witness from invalidating the disposition; but in *In the Estate of Wardrop* [1917] P. 54 (cf. *In re Wernher*, *supra*) no such evidence was required, notwithstanding the fact that the will would have been effective when made as an ordinary will.

The privilege was extended by the Wills (Soldiers and Sailors) Act, 1918, to the making of wills disposing of, or exercising powers over, real estate, whether or not the testator is an infant.

The Act also enables a soldier or sailor during infancy to dispose of (including, as was held in *In re Wernher* [1918] 2 Ch. 82, to exercise a power of appointment over) personalty.

A testamentary appointment of guardians may also now be validly made by a privileged will.

The privilege extends to the making of written wills, however informal, whether signed or not, and whether in the testator's handwriting or not; though if an unattested will is not found in the testator's possession at his death, evidence of handwriting alone will not support it (*Rutherford* v. *Maule*, 4 Hag. 213). The will may take the form of a letter, or directions to the trustees of an earlier formal will (*In the Estate of Tollemache* [1917] P. 246), or verbal declarations of intention in the presence of witnesses, even if made in ordinary conversation (*Re Stable* [1919] P. 7; cf. *In the Goods of Scott* [1903] P. 243); and an endorsement on an envelope containing an informal will may amount to a privileged re-publication (*In the Goods of Taylor* [1933] Ir. R. 709). Nuncupative wills were formerly discouraged, as is hardly to be wondered at, considering such cases as *Cole* v. *Mordaunt*, 4 Ves. 195*n*, in which most of the nine witnesses called to support the will were afterwards convicted of perjury; but a nuncupative will by a soldier is clearly valid, if duly proved.

There must, however, in all cases be testamentary intention. Thus, a mere incorrect statement as to the effect of a former will (*In the Estate of Beech*; *Beech* v. *The Public Trustee* [1923] P. 46), or a remark by the deceased, when told wrongly that if he died intestate all his property would go to his mother, that that was how he wished it to go (*In the Estate of Donner*, 34 T.L.R. 138) will not constitute testamentary acts. But it was held in *Re Stable* [1919] P. 7 that it is not essential to prove that the testator knew that he was making a will, or even that he had power to do so; the statement must be meant for a will only in the sense that it is intended deliberately to express his wishes as to what should be done with his property in the event of his death.

In *In the Estate of Grey* [1922] P. 140 the testator had made a holograph will with an attestation clause, which he signed six days prior to his death, but without witnesses. The will was held invalid on other grounds, no question being raised as to the absence of attestation, although in regard to wills made prior to the Wills Act, such absence would have raised a presumption that the will had not been adopted by the testator.

Alterations or interlineations in a soldier's holograph will are presumed to be part of the testamentary directions made while on service (*In the Goods of Tweedale*, 3 P. & D. 204; *In the Goods of Taylor*, *supra*).

As we have seen, it was decided in *Re Booth*, *supra*, that a soldier's will is not *ipso facto* revoked by his return to civil life. It was also there held that such a will, if in writing, falls within s. 20 of the Wills Act, 1837, and can only be revoked in the same manner as a formal will. In the earlier case of *In the Estate of Gossage* [1921] P. 194, which was not cited, a letter of the testator instructing his sister to burn his will, was held to be an effectual revocation as being a sufficient "writing declaring an intention to revoke the will" within s. 20, though Younger, L.J., preferred to arrive at the same result on the ground that a soldier's will did not fall within that section at all. In *In the Estate of Taylor* [1916] P. 54 it was held that a soldier's written will was revoked by marriage under s. 18. Whether a soldier's *nuncupative* will would be within s. 20 is, however, open to doubt, and Lord Merrivale in *Re Booth*, *supra*, expressly reserved his opinion on it. But the language of s. 18, as also of ss. 24 and 27 (which provide respectively that a will shall speak from the death, and that a residuary bequest shall operate to exercise a general power of appointment), appears to cover such a will (see as to the latter the judgment of Bankes, L.J., in *In re Wernher* [1918] 2 Ch. 82).

There is another question which, though not confined to privileged wills, is perhaps more likely to arise in connection with them than with formal wills, viz., whether the document is intended to operate only in a certain contingency.

When the will refers to the possibility of death in the war or in a particular event in the campaign, it is often doubtful whether it is intended to be conditional on death in those circumstances. When this doubt arises, the whole language of the document and the surrounding circumstances are to be considered; and it was held in *Vines* v. *Vines* [1910] P. 147, that declarations of the deceased are also admissible. In *In the Goods of Spratt* [1897] P. 28, where all the earlier cases were considered, Sir F. Jeune laid down two criteria which were especially useful when the language was not clear. The first was whether the nature of the disposition appears to have relation to the time or circumstances of the contingency; e.g., if the provisions are of a temporary nature or relate only to the property then possessed by the testator. The second was whether the period of danger coincides with the period of the contingency referred to, because, if it does, there is ground for supposing that the danger was regarded by the testator only as the reason for making the will; but if it does not, it is difficult to see the object of referring to a particular period unless it be to limit the operation of the will. An example of the danger so coinciding is to be found in the words "in case of an accident" after a reference to the dangers of the campaign; of its not coinciding, in the phrase "if I die at sea *or abroad*" in a sailor's will.

There is, however, as was pointed out in *In the Goods of Coleman* [1920], 2 Ir. R. 332, a presumption against a will being conditional when this would result in an intestacy.

A somewhat similar problem may arise in regard to memoranda or instructions for a will.

These may be intended to be operative during a period of danger, or until a more formal document can be prepared. The principles to be derived from the old cases are enumerated in *Godman* v. *Godman* [1920] P. 61; see, particularly, the judgment of Scrutton, L.J. Notes or memoranda of a will may be admitted to probate if the court is satisfied by parole evidence or by the document itself that it really is the fixed and final expression of the testator's wishes. As regards instructions for a will, it is necessary to prove both that the deceased had finally decided to make the dispositions, and that he had never abandoned that intention, but was prevented by act of God from completing his will. If he dies very soon after making the instructions, the presumption will be that he adhered to them up to his death; but if a long time has elapsed and he had opportunities of making a formal document, the presumption will be to the contrary.

(*To be continued.*)

A Conveyancer's Diary.

Tenancy at Will: Limitation.

SOMETIMES one chances upon a very simple set of facts which gives rise to a surprising variety of subtle and involved legal problems. Unfortunately, when one comes across them in practice there is only too often not enough money at stake to justify proceedings. I have had suggested to me the following case: A is the father of a family, one of whom is his son B. The latter is about to be married, and A promises to let him and his wife C have a certain house, Blackacre, which already belongs to A, as a wedding present. B and C are duly married and go to live at Blackacre. There is nothing in writing and no one pays A anything. Eventually A dies, leaving his whole estate equally between all his children. B is one of his executors, C is not, and, of course, is not a beneficiary. The problem is what becomes of Blackacre?

Assuming that A had actually conveyed the fee simple to B, there would be no doubt at all that B would have got a good title to it under the equitable doctrine of advancement, and would have to bring its value into account against his share of A's estate, under the rule against double portions.

But in the case imagined, there was nothing in writing. Consequently the legal and equitable titles both remained vested in A, when B and C entered. The legal title was never changed, because such things lie in grant, and there was no deed. And no fresh equitable title was created, as there was nothing in writing (L.P.A., 1925, s. 53), and for that matter no contract to convey could be set up, as, whatever else it was, it was a contract made in consideration of marriage, which requires to be evidenced by writing under the Statute of Frauds.

We are left, then, with the simple fact: the title to Blackacre is in A; but the close is occupied by C, accompanied by B. If A's death occurs within twelve years of C's marriage, Blackacre is simply part of A's estate, and falls to be sold and divided. That is so on any view. In these events there would seem also to be a question whether B alone, or B and C together, are liable to make some payment to A's estate for the user of the premises. Such a payment would not be in the nature of mesne profits; those are merely damages for trespass, and there was no trespass as A allowed B and C to enter. It would, if anything, be a "use and occupation rent" on the basis that A was a tenant at will. That is the only form of tenancy which can be created by parol, except a lease for not exceeding three years, which this was not (L.P.A., s. 54). But as a tenancy at will can be created by parol, B could presumably give parol evidence that he was to have the premises rent free.

Suppose, now, that instead of dying in less than twelve years, A survives for thirteen years or more, then B, or B and C, could successfully set up a statutory title, since it is provided by the Limitation Act, 1939, s. 9 (1), replacing the Real Property Limitation Act, 1833, s. 7, that between a landlord and a tenant at will, the tenancy at will is, for the purposes of the Act, to be deemed to have determined at the end of one year from the date on which it began, unless previously determined, and the right of action of the landlord to recover the land is to be deemed to have accrued at that date. The consequence is that a tenant at will becomes absolute owner at the end of thirteen years from the date on which he entered, unless he checks the running of time by a written acknowledgment conforming to s. 24 of the Act, or by a payment of rent (s. 23). Neither of those things had been done in the imagined case, and consequently the land would no longer be part of A's estate at A's death. Further, since the title acquired would be one *adverse* to A, there could be no question of the value of Blackacre being brought into account in the distribution of A's estate. In these circumstances the only outstanding question would be as between B and C. Would the statutory title be in B alone or in both of them? If it were in both of them, there would be no doubt that they would be joint tenants, for *prima facie* all co-disseisors take as joint tenants. That was so even in *Ward* v. *Ward*, L.R. 6 Ch. 789, where the co-disseisors were already tenants in common of part of the land and had disseised another tenant in common. It would be possible, of course, for either B or C to sever the joint tenancy at any stage during or after the running of the thirteen years, but it would require a positive act. But there would be a good deal to be said for the view that in the circumstances imagined it would be B, and he alone, who would have been in possession during the period and who would acquire the statutory title. He could well argue that it was he who was the son of A, and therefore he to whom A really meant to make a wedding present of Blackacre, even though A may colloquially have said that it was a present to both B and C. Moreover, in all human probability, it would have been B who made himself responsible throughout the thirteen years for the rates and similar outgoings, and who generally comported himself as owner. The question would be purely one of evidence adduced to show who was, in the true legal sense, in possession, but one would expect to find a balance of evidence in B's favour as against C.

Suppose now that the testator lives rather less than the full thirteen years and then dies. B is his executor, if he proves the will, the probate will relate back to the death, and as from that moment the running of time would be suspended, since the same party would be one of the potential plaintiffs, as one of A's personal representatives, and a potential defendant as one of the disseisors (see *Seagram* v. *Knight*, L.R. 2 Ch. 628). The result would be unfortunate for B, because this position would last until he had distributed his testator's estate, and in the course of distributing it would be his duty to deal with an asset, Blackacre, to which the testator had a good paper title against which no one would be able to set up a statutory title.

B would, however, have a way of escape. He could fail to prove the will; it would be safest for him to renounce probate altogether, rather than to have power to prove reserved to him and come in later; for in that event he might be liable on a *devastavit* for deliberately allowing an asset of the testator to be lost. Alternatively, he could drop the idea that he alone had been in possession. If C also had been in possession, time would continue to run in her favour even though it was suspended from running in favour of her husband, and she at least could acquire a title if the executors failed to oust her in time. If that occurred a most difficult question would arise whether she alone acquired title, or whether she did so as trustee for herself and B. But as the failure to oust her would be at least negligence, and probably worse, on the executor's part, she would probably lay B open to an action of *devastavit*; the only safe course, therefore, is for B to renounce probate.

Landlord and Tenant Notebook.

An Invalid Disclaimer.

WHEN reading the report of *Metropolis Estate Co., Ltd.* v. *Wilde* (1940), 84 SOL. J. 513 (C.A.), in our issue of 31st August, I was reminded of some observations made by one of the characters in a play which I recently attended. Having announced that he was about to be sold up, he added that solicitors and accountants were hard at it working out how much was due to each of his various creditors, and then went on to observe that the question appeared to be an academic one as none of them would receive anything. The recent decision shows that even when this is the case the operation of the elaborate machinery of the Bankruptcy Act is not necessarily a matter of crying over spilt milk.

Shortly, the facts were that the tenant of a flat let at £200 a year had been adjudicated bankrupt; he had not disclosed the tenancy to his trustee, who was the Official Receiver; he had obtained his discharge subject to twelve months' suspension; that period had elapsed, and he was sued for a quarter's rent subsequently accrued due. The Official Receiver, without seeking leave, then purported to disclaim the lease.

It was not too late to disclaim, for while twelve months from adjudication is the period first mentioned in the Bankruptcy Act, 1914, s. 54 (1), that subsection goes on to provide that "where any property has not come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within twelve months after he has become aware thereof. . . ." But, rent and value being not less than £20 a year and none of the other exceptions obtaining, the failure to obtain leave of the court was fatal.

Luxmoore, L.J., in his judgment, went on to discuss the position of the trustee who, his lordship observed, remained liable for rent by way of privity of estate. The learned lord justice cited *Hopkinson* v. *Lovering* (1883), 11 Q.B.D. 92. The facts of that case were, it may be said, very different from those of the case before the court; it is the authority which showed that despite the reforms introduced by the Act of 1869, it was still open to a trustee to get rid of liability, even after refusing to disclaim, by assigning (purely out of annoyance) to a pauper; for the claim must rest upon privity of estate, and the assignment, whatever be the assignor's motive, destroys that privity. The point was, of course, that there was no privity of contract; and since *Hopkinson* v. *Lovering* we have had *Re Jackson; Ex parte Blackett* (1894), 70 L.T. 381, showing that even a covenant against alienation which specifies assigns in law will not prevent this principle from operating.

Then, in so far as the defence to the claim was that the plaintiffs ought to have proved in the bankruptcy, the answer was that they could not have done so. *Re New Oriental Bank Corporation* (*No.* 2) [1895] 1 Ch. 753, was cited; here again, the facts were somewhat dissimilar, for the action arose out of the winding up of a company, but the reasoning of the judgment in which it was pointed out that proof must be limited to breaches to date would apply.

It followed from this that the defendant's discharge from bankruptcy had not affected his liability for the rent claimed, for s. 28 (2) of the Act limits release to debts provable in bankruptcy.

It is perhaps not surprising that the authorities cited appear at first sight to be not very much in point; the opportunity for dealing with situations of the kind provided by the alternative methods of disclaimer and assignment must account for the absence of decisions on facts more closely analogous. It is, perhaps, a little strange that the Official Receiver should have remained ignorant of his interest in this part of the bankrupt's estate, a flat situated, incidentally, within an estate agent's stone's-throw of Carey Street; however, we are indebted to this ignorance for a new authority.

It was not necessary to go into the question whether leave to disclaim would have been granted or refused; but this is another point on which authority would be welcome. We have a vast number of decisions showing when conditions ought to be imposed, and what conditions should be imposed, when leave is granted; but there does not appear to be any report of a case in which leave was refused without qualification. In one of the cases alluded to, we have a somewhat general statement of principle, namely, in *Ex parte East and West India Dock Co., Re Clarke* (1881), 16 Ch. D. 759 (C.A.), in which leave was granted to the trustee of a bankrupt assignee on the ground that "the property was not worth the rent" despite the opposition of landlords who feared that the liability of the original grantee would be destroyed. In the course of his judgment, Lord Selborne, L.C., observed that the object of the provision was "to cut short by disclaimer all liability of the bankrupt's estate in the classes of cases which are there referred to . . . On the face of the section it appears that the power given by it is to be exercised with a view to the administration in bankruptcy of the bankrupt's estate, and *for the benefit of all the persons* interested in that administration." From this, and from the nature of the cases in which disclaimer may be effected without leave, one can glean some guidance; but something more definite may some day be vouchsafed us.

Our County Court Letter.

Damage from Frozen Water Pipes.

In *Palmer* v. *Trust Houses, Ltd.*, at Cheltenham County Court, the claim was for £37 19s. 1d. as damages for negligence. The plaintiff was a milliner and occupied a shop under the Royal Hotel. During the frost in January a burst pipe in the hotel had overflowed, causing damage to the plaintiff's fittings and stock of hats. Negligence was alleged in (*a*) failing to empty the tanks and failing to cover the pipes, whereby the pipes were allowed to freeze; (*b*) omitting to turn off the stop-cock when the burst was discovered. Negligence was denied on the ground that it was unreasonable to expect the measures suggested in (*a*). There was also no negligence in not turning off the stop-cock, as no one knew where it was. Moreover, the plaintiff should have mitigated his loss by selling some of the damaged goods at reduced prices. His Honour Judge Kennedy, K.C., observed that frost was uncertain and uncontrollable, and there was no negligence in the omission to take the measures set out in item (*a*), *supra*. It was, however, unthinkable that no one in the hotel knew the situation of the stop-cock (which was within easy reach) or what to do in such an emergency. The flooding therefore continued until the arrival of a plumber and this constituted negligence. There was no market for soaked hats, and judgment was given for the plaintiff for £21 and costs. It is to be noted that the mere fact of the bursting of a water pipe, without negligence, does not establish a cause of action. An overflow from film-washing apparatus has been held, however, to be within the rule in *Rylands* v. *Fletcher* (see *Western Engraving Co.* v. *Film Laboratories, Ltd.* (1936), 80 Sol. J. 165). With regard to burst pipes on premises left vacant during frost, see *Tilley* v. *Stevenson* (1939), 83 Sol. J. 943. Compare also a previous case noted under the above title at p. 462, *ante*.

Negligent Rabbit Shooting.

In *Leonard* v. *Morris*, at Bromyard County Court, the claim was for damages for negligence, viz., £9 17s. 6d. special damage and £30 general damages for pain and suffering. The case for the plaintiff was that he had reached a stile, while walking across some fields, when he heard a shot. Another shot followed immediately, and the plaintiff felt pellets in his face and elbow. The defendant was then seen, with his gun up, at a distance of 34 yards. The plaintiff shouted: "Do you know you have shot me?" The defendant replied: "I did not see you." The plaintiff lost £8 in wages while under treatment. He had been on the road side of the stile when hit. The defendant's case was that he was shooting rabbits with a 12-bore double-barrelled shot gun. At the time of firing, he had been 3 yards from the hedge and 15 yards from the stile. There was a steep slope from the stile to where the defendant had been while firing. The shots must have fallen 50 yards from the stile. Corroborative evidence was given that no one was at the stile when the shots were fired. The plaintiff appeared afterwards. His Honour Judge Roope Reeve, K.C., preferred the plaintiff's evidence as to the distance. The defendant had apparently been not more than 40 yards from the stile when shooting. Judgment was given for the plaintiff for £15 with costs, payable at £1 a month.

Decisions under the Workmen's Compensation Acts.

Reduction of Compensation.

In *Coalville Urban District Council* v. *Roberts*, at Ashby-de-la-Zouch County Court, an application was made for the termination of compensation of £1 2s. 8d. a week. The respondent was sixty-five years old, and had strained himself in July, 1939, while working at the gasworks. The case for the applicants was that the respondent was now fit to work as a labourer. The respondent's case was that his incapacity was still continuing. His Honour Judge Galbraith, K.C., sitting with a medical assessor, held that there was still partial incapacity, and that the present value of the applicant in the labour market could be assessed at 22s. 6d. a week. An award was made of 13s. 8d. a week, the respondent to pay half the applicants' taxed costs.

To-day and Yesterday.

Legal Calendar.

9 September.—On the 9th September, 1904, Alfred Tristram Lawrence became a Justice of the King's Bench, leaving behind a large and varied practice at the Bar and bringing with him a sound reputation for legal knowledge. For seventeen years he worked reliably and usefully as a puisne judge and then at the age of seventy-eight he accepted the office of Lord Chief Justice of England and became a peer with the title of Lord Trevethin. Though the legal profession was surprised and somewhat disapproving, he worthily maintained the traditions of his great charge during the brief period he held it.

10 September.—Lord Shandon, formerly Lord Chancellor of Ireland, died in London the 10th September, 1930.

11 September.—On the 11th September, 1751, Joseph Goddard, the keeper of the "White Horse" Inn at Cranford Bridge, was tried at the Old Bailey on the charge of robbing an old itinerant jew from Poland of over five hundred ducats. It was one man's word against the other. The jew, who could speak no English, said that he came to England to buy watches and second-hand clothes. He gave a circumstantial account of how, after he had retired to rest at the inn, the landlord and another man overpowered him and took the money from a girdle round his body, and how, when he shouted out of the window, they returned and knocked him down and threatened him. The landlord admitted that in the morning his guest complained of having been robbed, but denied all the other circumstances. As several gentlemen spoke to the prisoner's good character and the story seemed very unlikely, he was acquitted.

12 September.—On the 12th September, 1792, the court martial of the "Bounty" mutineers opened at Portsmouth on board H.M.S. "Duke," Lord Hood presiding. Ten men were called upon to answer the charge of mutinously running away with the vessel and deserting from the service. As to the rest of the men who had been on board, when the mutineers turned Captain Bligh and his adherents adrift in the launch to sail for seven weeks across the open sea, some had disappeared to found the idyllic community on Pitcairn Island and others had been drowned on the voyage home. In the end only three men were hanged over the affair.

13 September.—Cardinal Morton died on the 13th September, 1500, broken by age and infirmities after a lingering illness. He had been Lord Chancellor for thirteen years in the service of Henry VII. During that time he carried through a work analogous to that subsequently performed in France by another great churchman, Cardinal Richelieu; he curbed the excessive power of the great feudal lords. In this, one of his instruments was the Star Chamber, conceived as "a Court of Criminal Equity." The great Sir Thomas More was in his youth a page in the Cardinal's household.

14 September.—On the 14th September, 1734, "one Bowers, an ale-house man, and Captain O'Neal and his man were tried at Hick's Hall for enlisting men into foreign service. It appeared by the evidence that in July last the Captain, having engaged some men on pretence of employing them in harvest work in Kent, agreed with the master of the ship 'Thomas and Mary' for two guineas to carry himself and four of his pretended servants, viz., three Irishmen and one Englishman, to Calais, telling the master he had made them believe they were to work in some mines of his in France. Under these and like pretences he got them landed in that country where they were immediately committed to a file of musketeers who carried them the next day further up the country. The captain and his man were found guilty and Bowers acquitted."

15 September.—At the conclusion of the Old Bailey Sessions which ended on the 15th September, 1733, "the Grand Jury presented four noted solicitors for infamous practices in fomenting and carrying on prosecutions against innocent persons for the sake of rewards, etc., whereupon the court returned thanks to the Grand Jury and assured them that the offenders should be rigorously prosecuted."

THE WEEK'S PERSONALITY.

Lord Shandon got his peerage as a sort of consolation prize for having been pushed out of the Irish Chancellorship on political grounds to make way for his rival, Sir James Campbell. His title he took from childhood memories of those bells of Shandon which inspired the famous poem, for he was born at Cork, the ninth child of Mark O'Brien, a merchant there. His family was not wealthy, and after two years at the Catholic University of Ireland he became a journalist in Dublin. At the same time, however, he read for the Bar, and in 1881 at the age of twenty-four he was called. In the first year of his practice he made six guineas and in the second twenty-nine. Soon he despaired of attaining any solid success, and he was just about to emigrate to New South Wales when a case in which he obtained the release by *habeas corpus* of a Catholic priest, committed to prison in oppressive circumstances, attracted attention to his solid ability and set him on the road to success. In 1899 he took silk. In 1911 he became Solicitor-General, in 1912 Attorney-General, and in 1913 Lord Chancellor. Though his abilities were not of the first rank, he was hardworking and pertinacious, and while he was in office he exercised a moderating influence in troubled times.

LEGAL FOREFATHERS.

When the Duke of Grafton taunted him in the House of Lords with his plebeian origin, Lord Chancellor Thurlow replied by a crushing speech in the course of which he said: "The noble Duke cannot look before him, behind him or on either side of him without seeing some noble peer who owes his seat in this House to successful exertions in the profession to which I belong." That was, and still is, true, and it is extraordinary how often the current news touching the holder of some title stirs legal memories. Thus the announcement that Viscount Brackley, son and heir of the Earl of Ellesmere, was a prisoner of war carried the mind back to the days of James I when those titles were created. When Elizabeth died and the new king crossed the Border he retained Sir Thomas Egerton as Lord Keeper, afterwards creating him Baron Ellesmere and appointing him Chancellor. In 1616 he was further advanced in the peerage as Viscount Brackley and the wits of Westminster Hall called him "Viscount Break-law" because of his interference with the judgments of the common law courts. His son rose higher and became Duke of Bridgwater. Though the male line failed, the titles of the Chancellor were revived in 1846 in the person of a descendant. The accidental death of Lord North, son and heir of the Earl of Guilford, by the explosion of a land mine, stirred memories of his ancestor Francis North, first Baron Guilford, Lord Keeper in the reign of Charles II, while the recent sale of Bathurst House in Belgrave Square by Countess Bathurst recalled Lord Bathurst, who became Lord Chancellor in 1771.

A VINDICATION.

The speech in which Lord Thurlow discomforted the Duke of Grafton is so forcible that even in print the effect produced by it is not lost, though the look of Jove grasping the thunder with which he rose from the Woolsack can only be imagined. Having referred to the attainments of the legal peers and their descendants, he asked: "Does he not feel that it is as honourable to owe his seat to these as to being the accident of an accident? To these noble lords the language of the noble Duke is as applicable and as insulting as it is to myself. But I don't fear to meet it single and alone. No one venerates the peerage more than I do, but, my lords, I must say that the peerage solicited me, not I the peerage. Nay, more, I can and will say that as a peer of Parliament, as Speaker of this right honourable House, as Keeper of the Great Seal, as guardian of His Majesty's conscience, as Lord High Chancellor of England, nay even in that character alone in which the noble Duke would think it an affront to be considered—as a Man—I am at this moment as much respected as the proudest peer I now look down upon."

LAW COURTS: HOURS OF SITTINGS.

From the 14th October onwards the hours of the sittings of the Court of Appeal and the Supreme Court on weekdays, other than Saturdays, will be from 10 a.m. to 3.30 p.m.

Notes of Cases.

COURT OF APPEAL.

Cleadon Trust, Ltd. *v.* Davis.

Scott, Clauson and Luxmoore, L.JJ. 25th July, 1940.

Vendor and purchaser—Contract for sale—Vendor to obtain release of restrictions as to user—Benefit of restrictions vested in local authority—Town planning resolution passed—Land to be unbuilt upon—Order for specific performance—Whether vendor bound to obtain release of restrictions—Town and Country Planning Act, 1932 (22 & 23 *Geo.* 5, *c.* 48), *s.* 6.

Appeal from a decision of Bennett, J.

By a contract dated the 24th September, 1937, the plaintiffs agreed to sell and the defendant to buy a plot of land at Slough which was subject to restrictive covenants prohibiting the erection thereon of any buildings other than private dwelling-houses. By cl. 5 the vendors undertook to obtain a modification of the restrictions so as to enable the purchaser to build a block of flats. The contract contained an option to purchase a further plot of land upon the same terms and conditions so far "as applicable thereto." The Slough Urban District Council subsequently became the owners of the land entitled to the benefit of the restrictions. On the 24th May, 1938, the council passed a resolution under the Town and Country Planning Act, 1932, s. 6, for the preparation of a town planning scheme under which the land, subject to the option, was to be retained unbuilt upon as an open space. On the 20th September, 1938, the purchaser exercised the option to purchase the additional land. The vendors contended that the provision requiring them to obtain a modification of the covenants was no longer "applicable thereto," as it had been rendered immaterial by reason of the town planning resolution having rendered all building impossible. The vendors refused to complete until a release of the restrictions had been obtained. The vendors started an action for specific performance and obtained judgment. The purchaser in his requisitions insisted that the vendors must obtain the modification of the restrictions in accordance with the contract, and he took out this summons in the action asking for a declaration that he was not bound to perform the contract, and that it ought to be rescinded. Bennett, J., held that cl. 5 was no longer applicable, and dismissed the summons. The purchaser appealed.

SCOTT, L.J., allowing the appeal, said cl. 5 was a vital clause and applied to the purchase of the land subject to the option. The effect of the resolution approving the preparation of a town planning scheme under which the land was to be kept as an open space was not to create a binding town planning scheme. The scheme might be modified. The private restrictions imposed by the covenant could still be modified. The plaintiffs by their contract were bound to obtain this. The title was therefore defective, but was capable of being made good within a reasonable time. After the order for specific performance the purchaser could not repudiate the contract without the leave of the court: (*Halkett* v. *Dudley* (*Earl*) [1907] 1 Ch. 590). The proper order was that, if the vendors procured the necessary licence under cl. 5 within a reasonable time the inquiry into the title should proceed.

COUNSEL: *Harman*, K.C., and *D. Cohen*, for the appellant; *Vaisey*, K.C., and *A. C. Nesbitt*, for the respondents.

SOLICITORS: *Clutton, Moore & Lavington*, for *F. M. Parris*, Croydon; *T. D. Jones & Co.*, for *Criddle, Ord & Muckle*, Newcastle-upon-Tyne.

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

Bell Property Trust, Ltd. *v.* Hampstead Assessment Committee. Same *v.* Wandsworth Assessment Committee.

Scott, Clauson and Goddard, L.JJ. 8th August, 1940.

Rating—Service flats—Inclusive payment by tenant—Whether part of payment representing landlord's cost and profit of providing services to be deducted in arriving at gross value of flat.

Appeals from a decision of the Divisional Court.

In the first appeal the appellant company appealed to London Quarter Sessions against a decision of Hampstead Assessment Committee relating to the assessment of 123 hereditaments, the company's property. Quarter sessions reduced the assessments appearing in the supplemental valuation list of the Borough of Hampstead and stated a case for the opinion of the court. The following were material facts relating to the appellant's property, Eton Rise, Hampstead: Each of the 123 flats in that building was either let or to be let under a tenancy agreement under which the tenant paid periodically an inclusive sum, described as rent, for the occupation of the flat with enjoyment of the services and amenities provided by the appellants, such as domestic hot water, central heating, radio and other services usually provided by the landlords of high-class service flats. The question raised by the case was the proper method of arriving at the gross value, as defined by s. 4 (1) of the Valuation (Metropolis) Act, 1869, of each separate hereditament, with particular reference to the questions (*a*) whether the cost to the landlords of providing the services and amenities was deductible from the inclusive payments made by the tenants before arriving at the gross value, or whether the whole of the tenant's payment must be regarded as rent, only such deductions being made as were permissible

under the Schedule to the Act of 1869; and (*b*) whether the sum of £932 representing the landlord's profit from the combined annual payment of the tenants so far as appropriated to services was deductible, the percentage of each inclusive payment by a tenant which represented his payment for the services and amenities (i.e., the landlord's cost of and profit in providing them) being ascertained. (*Cur. adv. vult.*)

GODDARD, L.J., reading the judgment of the court, said that in some cases which had come before the courts separate agreements providing for separate payments were made in respect of certain of those amenities. In the present case the tenants paid a gross sum which included the rent and the amenities. The question raised by the special case turned entirely on what portion of that gross sum was actually for rent and how much of it was remuneration for services and amenities provided by the landlords. The assessment committee agreed with the parties' respective surveyors that the method adopted should be to find out the value of the services and amenities and deduct them from the gross sum paid by the tenant. The difference which had arisen had been with regard to particular items claimed by the one side but resisted by the other as legitimate deductions. Before quarter sessions it was submitted for the respondent assessment committee that none of the items could be deducted, but that they could only be deducted, if at all, as "other expenses necessary to maintain the hereditament in a state to command the rent." Counsel contended that that followed from *Pullen* v. *St. Saviour's Union* [1900] 1 Q.B. 138. Quarter sessions had not given effect to that decision, possibly because they had thought it distinguishable. The Divisional Court held themselves bound by it, and accordingly restored the valuation of the assessment committee. The Divisional Court had followed *Pullen* v. *St. Saviour's Union*, *supra*, with reluctance, and the question now was whether it should be overruled. In that case each tenant had to pay 6d. a week in addition to the rent, and out of those sixpences the landlord arranged for the cleaning and lighting of the staircase. Quarter sessions held that the 6d. should be regarded as part of the rent, and the High Court affirmed their decision. That decision was wrong and must be overruled. There was no difference in principle between the present case and the letting of a furnished flat. The hypothetical tenant was not concerned with what it cost the landlord to provide services and amenities; he considered only what he could afford to pay for all that he received; but it was none the less true that what he paid for the use of the flat itself was the rent reserved less a proper remuneration to the landlord for services such as hot water in the tenant's taps and radiators. The appeal would be allowed, with costs.

COUNSEL: *S. G. Turner*, K.C., *Blanco White*, K.C., and *Paul Springman*; *Comyns Carr*, K.C., and *Michael Rowe*, for the assessment committee.

SOLICITORS: *Simmons & Simmons*; *R. H. Jerman.*

The facts were identical in the second appeal, which accordingly was also allowed.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

APPEALS FROM COUNTY COURTS.

Heap *v.* Ind Coope and Allsopp, Ltd.

MacKinnon and Luxmoore, L.JJ., and Tucker, J.
4th July, 1940.

Negligence—Landlord's reservation of right of entry to do repairs—Duty to passers-by—Remedy against landlord—Not excluded by concurrent remedy against tenant.

Appeal from a judgment for the plaintiff given by His Honour Judge A. C. Caporn at the Walsall County Court on 20th May, 1940.

The action was one for damages for personal injuries which the plaintiff had suffered through falling through a cellar flap with defective glass lights on the external part of the defendants' premises. The defendants were the landlords of the premises, but held under a lease with the freeholders, under which they covenanted with the freeholders that they would from time to time and at all times keep the premises in good and tenantable repair and condition. Under the defendants' lease with their tenant there was no covenant by them that they would keep the premises externally in repair, or structurally in repair, but it was part of the tenant's covenants that he would permit the agents of the landlords, or any person authorised by them, to enter upon the premises at any time and at all reasonable times for the purpose of viewing the state of the premises, and, at the tenant's own expense, make good all defects and want of reparations therein. These latter referred to defects which the tenant had failed to remedy under a covenant by him to keep the interior of the premises in repair. The defendants had from time to time carried out all necessary repairs and had some time previously done some small repairs to the cellar flap under consideration, by putting a wooden substitute into a place left by a glass section which had been broken. The tenant was not joined as a defendant or as a third party. The county court judge gave judgment for the plaintiff for £500 and costs.

MACKINNON, L.J., said that it was held by Goddard, J., in *Wilchick* v. *Marks and Silverstone* [1934] 2 K.B. 56, that, where a third party had been injured by the lack of repair of a house, and the landlords had not covenanted to do the repairs but had reserved a right to enter and do the repairs if they thought fit, that was sufficient to give the damaged third party a direct right of action against the landlord, and it did not merely limit him to a right against the occupier. Goddard, J., added that that rule of liability could arise only in a case where the landlord knew, or had notice, of the defect or lack of repair in the property in question. That qualification that the landlord must know that repairs were wanted or that the defect was existing had been said to be incorrect in *Wringe* v. *Cohen* [1940] 1 K.B. 229. Goddard, J., said at p. 67 of [1934] 2 K.B.: "If I use a highway the duty I am under not to injure other persons is not special or contractual, but general, arising from what Lord Esher used to call proximity. A property owner knows that his house if not repaired must at some time get into a dangerous state; he lets it to a tenant and puts him under no obligation to keep it repaired; it may be that the tenant is one who from lack of means could not do any repairs. The landlord has expressly reserved to himself the right to enter and do necessary repairs; why then should he be under no duty to make it safe for passers-by when he knows that the property is dangerous? The proximity is there; he has the right to enter and remedy a known danger. Is the injured person to be left in such a case only to a remedy against the tenant?" Omitting the words "when he knows that the property is dangerous," in view of the later statement in *Wringe* v. *Cohen*, *supra*, that statement exactly covered the position in this case, and the decision of the county court judge was correct.

LUXMOORE, L.J., and TUCKER, J., agreed, and the appeal was dismissed, with costs.

COUNSEL: *D. M. Rosenberg*; *W. Longley James.*

SOLICITORS: *S. Rutter & Co.*; *Peacock & Goddard*, for *Ernest W. Haden & Stretton.*

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

HIGH COURT—CHANCERY DIVISION.

Lee *v.* Lee.

Morton, J. 26th July, 1940.

Practice—Partnership action—Receiver appointed—Fund in court exceeds £1,000—Application to pay receiver's remuneration out of fund—R.S.C., Ord. LV, r. 2, sub-rr. (2), (13).

R.S.C., Ord. LV, r. 2, provides: "The business to be disposed of in chambers by judges of the Chancery Division, shall consist of the following matters, in addition to the matters which, under any other rule or by statute, may be disposed of in chambers . . . (2) Applications for payment or transfer to any person of any cash . . . standing to the credit of any cause or matter where the cash does not exceed £1,000 . . . (13) Applications connected with the management of property . . ."

In 1928 the respondent started a partnership action against the appellant, his partner. In 1929 an order was made dissolving the partnership and W was duly appointed receiver and manager of the partnership business. In March, 1940, the Master certified that the sum of £1,005 2s. 7d. was due to the receiver. At this date there was in court to the credit of the action the sum of £3,514 18s. 3d. The appellant by this summons asked that there might be paid to the receiver out of the funds in court the sum certified to be due to him. It was suggested that there was no jurisdiction to make the order as the sum in court exceeded £1,000.

MORTON, J., said he accepted what Clauson, J., as he then was, had said in *In re Terry*; *Terry* v. *Terry* [1929] 2 Ch. 412, 415. The present application was "connected with the management of property." The fund in court was properly applicable for the payment of the sum due to the receiver. He had power under sub-r. (13) of r. 2, Ord. LV, to make an order for payment to the receiver out of the funds in court.

COUNSEL: *Timins*; *J. L. Stone*; *W. Waite.*

SOLICITORS: *Kinch & Richardson*, for *Percy Hughes & Roberts*, Birkenhead; *Bentley, Taylor & Co.*, for *Timperley & Wallace*, Ellesmere Port; *Hamlins, Grammer & Hamlin*, for *Thompson, Rigby and Son*, Birkenhead.

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

In re Lawton; Lloyds Bank, Ltd. *v.* Longfleet St. Mary's Parochial Church Council.

Simonds, J. 31st July, 1940.

Will—Construction—Bequest to "trustees for time being of parish church"—No such trustees in existence—Whether general charitable intention.

The testator by his will devised and bequeathed the residue of his estate "to the trustees for the time being of the Church of Saint Mary in the parish of Longfleet, Poole, Dorset, to be used by them in their absolute discretion for any purpose or object permitted by the trust deed under which they operate." There were and never had been any trustees of the parish church and there was no trust deed. This summons was taken out by the executors and trustees of the testator's will to determine whether the residuary gift was a valid gift.

SIMONDS, J., said that as there were no trustees and there never had been a trust deed it was obvious that the gift must fail unless he could find a general charitable intention. It was argued that since there was no deed forthcoming it must be inferred that the objects were charitable because the gift was to trustees of the church. A gift

to trustees of a church was not to be presumed to be a gift for charitable purposes any more than a gift to the trustees of a chapel (*Aston* v. *Wood* (1868), L.R. 6 Eq. 419). He must come to the conclusion that the gift to the trustees was not to be presumed to be a gift for charitable purposes. The trustees of a church might hold a fund as well for non-charitable as for charitable purposes. If it was intended that the gift should be merely for ecclesiastical purposes which were charitable, the obvious course would have been to make the gift to the vicar and churchwardens. In which case it would have been held that the gift was held by the donees for ecclesiastical and therefore charitable purposes. The gift was not charitable and failed for uncertainty.

COUNSEL: *Myles; A. C. Nesbitt; Molony; Danckwerts.*

SOLICITORS: *Peacock & Goddard*, for *Trevanion & Curtis*, Poole; *Church, Adams, Tatham & Co.*, for *Dickinson, Manser, Brandreth and Yeatman*, Poole; *Treasury Solicitor.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

In re S. Brown & Son (General Warehousemen), Ltd.

Bennett, J. 30th July, 1940.

Emergency powers—Company—Debenture-holders appoint receiver with leave of the court—Company goes into voluntary liquidation—Receiver wishes to sell—Leave of the court necessary—Courts (Emergency Powers) Act, 1939 (2 & 3 *Geo.* 6, *c.* 67), *s.* 1 (2).

In February, 1940, the two debenture-holders of S. B., Ltd., having applied to the court and obtained leave under the Courts (Emergency Powers) Act, 1939, to appoint a receiver, duly appointed S. and C. to be receivers and managers of the property comprised in the debenture. Subsequently the company went into voluntary liquidation. S. and C., having found a purchaser for the property, took out this summons under the Act of 1939, asking that they might be at liberty to sell the property. The summons was subsequently amended by adding the two debenture-holders as applicants.

BENNETT, J., said that the result of the company going into voluntary liquidation was to put an end to the agency of the receivers *quoad* the company (*Gosling* v. *Gaskell* [1897] A.C. 575). The question arose whether the receivers when they asked to sell should obtain the leave of the court under s. 1 (2) of the Act. If the company had not gone into liquidation, it might have been difficult to say that the receivers as agents of the company were proceeding to exercise any remedy open to them. As a result of the liquidation the receivers in selling would be acting as agents of the debenture-holders. In these circumstances it was necessary for the leave of the court to be obtained at the instance of the debenture-holders, whose agents the receivers were. There was no difficulty in making the order and leave would be given to sell the property.

COUNSEL: *Montagu Gedge*, for the applicants; the company did not appear.

SOLICITORS: *Herbert Oppenheimer, Nathan & Vandyk.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

In re Wilson; Hurtley *v.* Marie Curie Hospital.

Bennett, J. 1st August, 1940.

Administration—Annuity—Capital sum to be appropriated to answer annuity—Appropriate fund given over—Abatement of legacies and annuities—Whether annuitant entitled to abated fund.

The testator, by his will, after appointing the plaintiffs to be executors and trustees thereof and giving certain legacies, bequeathed to his wife an annuity of £200 per annum for her life and he directed his trustees to set apart and invest investments the income of which would be sufficient at the time of investment to pay the annuity, with power to resort to the capital of the appropriated fund whenever the income should be insufficient. Any surplus was to be applied as income of residue. On the death of the annuitant the appropriated fund, or so much of it as had not been applied in paying the annuity, was to be divided equally between four named charities. The testator also gave two other annuities. The estate was insufficient to pay the legacies and annuities. By this summons the trustees asked on what basis they ought to compute the capital sum to meet the widow's annuity or whether it ought to be valued and abated as a legacy.

BENNETT, J., said the general rule was to ascertain the capital value of the annuity and treating that as a legacy, to abate it and to pay the abated value to the annuitant. That was the rule applied by Farwell, J., in *In re Farmer* [1939] Ch. 573; 82 SOL. J. 1050. The charities entitled to the annuity fund on the death of the annuitant contended that the proper course was to ascertain the sum required to produce the annuity, to abate that, invest the abated sum in Consols, and pay the income which it produced and so much of the capital as was necessary to the annuitant. It was suggested that the effect of the gift to the charities was to turn the capital of the annuity fund into a settled legacy. That principle was applied by Crossman, J., in *Re Nicholson* (1938), 82 SOL. J. 624. In the present case the testator had not given a settled legacy. He had given to his widow an annuity. The interests of the charities were subject and subsidiary to the interest of the annuitant. The rule applied in *In re Farmer, supra*, must be followed and the abated value of the annuity paid to the annuitant.

COUNSEL: *W. Waite*, for the plaintiff; *Humphrey King*, for the Marie Curie Hospital; *Elverston*, for the annuitant H.A.P.; *W. G. H. Cook*, for the charities entitled subject to the annuity; *Beebee*, for a pecuniary legatee; *Danckwerts*, for *the Attorney-General.*

SOLICITORS: *Haslewood, Hare & Co.*, for *C. V. Walker*, Leeds; *Bolton, Jobson & Yate-Lee; Arthur Pyke & Co.; Taylor & Nightingale*, for *Dibb, Lupton & Co.*, Leeds; *Treasury Solicitor.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

In re Thornhill's Settlement.

Bennett, J. 21st August, 1940.

Settled land—Tenant for life bankrupt—Unreasonable refusal to grant lease—Trustees authorised to exercise statutory powers—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *s.* 24.

Under a settlement of 1906 M was tenant for life of some 3,000 acres of agricultural land in Hampshire. He had been adjudicated bankrupt in 1924 and again in 1939. For some reason he had allowed the land to go out of cultivation. Farm houses and cottages had fallen down or become so dilapidated as to be beyond repair. Tenancies had not been renewed and squatters had taken possession of parts of the property. The whole estate had become in a deplorable condition. In the summer of 1939 one P approached the tenant for life with a view to taking a tenancy of two farms on the estate and bringing them back into cultivation. The tenant for life refused to grant a lease. In the autumn of 1939 the War Office served a requisition notice on the tenant for life in respect of part of the settled property. He failed to deal with the War Office. In these circumstances this summons was taken out by the Official Receiver, the tenant for life's trustee in bankruptcy, asking that the Public Trustee, as trustee of the settlement of 1906 for the purposes of the Settled Land Act, 1925, might be at liberty to exercise in the name and on behalf of the tenant for life the powers of a tenant for life under the Act. The application was made under s. 24 of the Settled Land Act, 1925, which provides that: "If it is shown to the satisfaction of the court that a tenant for life, who has by reason of bankruptcy . . . ceased in the opinion of the court to have a substantial interest in his estate or interest in the settled land or any part thereof, has unreasonably refused to exercise any of the powers conferred on him by this Act . . . the court may, . . . make an order authorising the trustee of the settlement, to exercise in the name and on behalf of the tenant for life under this Act any of the powers of a tenant for life under this Act, in relation to the settled land or any part thereof affected, either generally and in such manner and for such period as the court may think fit or in a particular instance . . ."

BENNETT, J., said the jurisdiction arose if the tenant for life was a bankrupt and had acted unreasonably. The tenant for life was a bankrupt. The fact that the property had been allowed to fall into a deplorable condition was not a sufficient ground for exercising the jurisdiction conferred by s. 24. The court had to find that the tenant for life had unreasonably refused to exercise the powers which the Act gave to him. The applicant had proved that the tenant for life had unreasonably refused to exercise his powers both in the case of P's application for a lease and in the case of the requisition by the War Office. It would be in the interests of everybody interested in the settled land that an order should be made authorising the Public Trustee to exercise on behalf of the tenant for life the powers of leasing and ancillary powers conferred by the Act, and a power to sell any land required by the War Office. He did not propose to make an order authorising the Public Trustee to exercise the power of sale in respect of the whole estate. The property had been in possession of the tenant for life's family since the reign of King John and he might have reasonable objections to the whole estate being disposed of. The learned judge further ordered the tenant for life to deliver to the Public Trustee all documents of title in his possession relating to the settled land.

COUNSEL: *Grant*, K.C., and *H. A. Rose; Norris*, for *R. H. Hodge.*

SOLICITORS: *Tarry, Sherlock & King; Farrer & Co.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

HIGH COURT—KING'S BENCH DIVISION.

Allighan *v.* London & Westminster Loan & Discount Co., Ltd.

Singleton, J. 9th July, 1940.

Moneylender—Contract of loan—Memorandum—Lack of clarity invalidating—Reference to earlier transactions by ledger numbers sufficient—Bill of sale included in memorandum—Copy given to borrower—No need to include copy of schedule to bill—Moneylenders Act, 1927 (17 & 18 *Geo.* 5, *c.* 21), *s.* 6.

Action claiming declarations that moneylending transactions were unenforceable.

In December, 1938, and February, 1939, the plaintiff, Allighan, entered into two moneylending transactions with the defendants, who were registered moneylenders. At the trial of the action varying explanations were given by opposing counsel and by a witness for the defendants as to the exact meaning of the memorandum of December, 1938, and the judge found that the document was not clear. That memorandum recited that a specified sum was owing by the plaintiff

to the defendants on two earlier loan transactions which were referred to only by the identification numbers which they bore in the defendants' books; the plaintiff, however, had in correspondence referred to those transactions by their numbers and therefore knew what the numbers meant. In respect of one of those two earlier transactions the sum stated in the memorandum of December, 1938, to have been paid as interest was calculated on the basis that interest at the rate agreed in that earlier transaction remained payable after the 2nd August, 1938, the date stipulated for repayment of principal and interest, although that earlier contract contained no provision for what was to happen in respect of interest after the 2nd August if, as had in fact happened, the plaintiff failed to make repayment on that date. Before signature by the plaintiff of the contract of February, 1939, the defendants wrote to inform the plaintiff that the stamp duties on the documents relating to the proposed transaction would amount to 15s. 10d. They did not in their letter or at any subsequent time call on the plaintiff to pay them that sum, nor was there any evidence that when the plaintiff paid the sum, which he did by separate cheque, his doing so was part of the contract of loan. The sum advanced under the contract of February, 1939, was secured by a bill of sale having a schedule in which was set out a list of the articles covered by the bill, all of which was attached to, and formed part of, the memorandum of the contract. To the copy of the memorandum of the contract which the defendants handed to the plaintiff in compliance with s. 6 of the Moneylenders Act, 1927, they attached a copy of the bill of sale but not of its schedule. The plaintiff now brought this action challenging the validity of the two transactions.

SINGLETON, J., said that he did not regard as of moment the fact that in the memorandum of December, 1938, the earlier transactions taken into account in it were referred to only by number, and not by date; in correspondence the plaintiff had himself referred to those transactions by their numbers. The memorandum was, however, in other respects far from clear. The defendants could have devised something far more easily intelligible to the borrower who, for the purposes of the Act, was to be regarded as a needy borrower. It was the duty of those who supplied such a memorandum to the borrower to make the matter clear to him. Further, the memorandum not being clear, it did not matter that there had been correspondence and conversations to make it clear. With regard to the item for interest in the memorandum of December, 1938, calculated on the basis that interest on one of the earlier transactions continued to run after the 2nd August, 1938, the date for repayment of principal and interest, counsel for the defendants argued that continuation of the covenant to pay interest was to be implied in law, and he cited *Cook* v. *Fowler* (1874), L.R. 7 H.L. 27. That case was not conclusive here; if the principal were not paid punctually the lender might perhaps recover as damages the equivalent of the interest; but that was a matter for the court. The memorandum of December, 1938, therefore contained a wrong statement of interest in respect of that earlier transaction, and was invalid also on that account. With regard to the contract of February, 1939, counsel for the defendants was right in his contention that there was no need to mention in the memorandum the plaintiff's payment of the 15s. 10d. for stamp duties. The defendants had done no more than call to the plaintiff's attention the amount of the stamp duties. The plaintiff had given no evidence that his payment of the duties was part of the bargain. His contention that that payment should have been mentioned in the memorandum failed. Counsel for the plaintiff next contended that the goods comprised in the bill of sale forming part of the contract of February, 1939, were not specified in the copy of the bill forming part of the copy of the memorandum supplied by the defendants to the plaintiff in compliance with s. 6 of the Act of 1927. The plaintiff accordingly, it was argued, did not know which of his goods were liable to be seized. That argument had at first seemed attractive, but counsel for the defendants had referred to *Reading Trust, Ltd.* v. *Spero* [1930] 1 K.B. 492, and in particular to Scrutton, L.J.'s words at p. 505. It was unnecessary in the circumstances for the protection of the borrower to mention in the memorandum every stick and every pan in the schedule to the bill of sale. The plaintiff's agreement placed an undue burden on the moneylender. Accordingly there must be judgment for the plaintiff on his claim under the first memorandum, and judgment for the defendants on his claim under the second. The plaintiff would have one-half of the costs of the action.

COUNSEL: *Harry Samuels; P. T. Rogers.*
SOLICITORS: *Arthur Dollond & Co.; Arthur Pyke & Co.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Grey *v.* Gee Cars, Ltd.

Humphreys, J. 26th July, 1940.

Negligence—Hire of car—Theft of customer's luggage by chauffeur supplied with car—Liability.

Action for damages for breach of contract.

On the 2nd September, 1939, the defendant company agreed to supply the plaintiff, Mrs. Grey, with a motor car and a reliable chauffeur to take her to Torquay on the following day for £6 5s. The plaintiff maintained that it was an express and an implied term of the contract that the chauffeur would be a thoroughly reliable, honest, and trustworthy man. The defendants duly sent a chauffeur to the plaintiff's flat on the morning of the 3rd September, and her luggage was loaded on to it; but, just as she was about to leave, an air-raid warning was sounded, and while she and her relative were in an air-raid shelter the chauffeur drove away the car, which contained luggage, jewellery, letters, and money belonging to her. She accordingly claimed the value of the articles lost. The defendants denied negligence or breach of contract, or that they were responsible for the plaintiff's loss.

HUMPHREYS, J., said that there was authority for the view that the defendants were not responsible as masters for the chauffeur's act in stealing the plaintiff's property. That act was not done in his capacity as a servant or in the course of his employment. The defendants had not engaged him as a thief. While the defendants would have been responsible for any act of negligence on the part of the chauffeur as he was their servant, they were not responsible for his crime. The claim was properly founded on alleged negligence and breach of contract, as had been pleaded. The sole question to be decided, therefore, was whether it was negligent of the defendants to send out this driver. It was not suggested that the defendants knew that he was a thief; it was probable that the theft would never have taken place but for the unfortunate fact that an air-raid alarm occurred when it did. The chauffeur was, so far as anyone could tell, a satisfactory servant, and the defendants had every reason to be satisfied with the way in which he had done his work. The man came to them from a labour exchange to which they had applied. It must be assumed that a person was honest until he was proved otherwise. It was alleged that there had been negligence on the part of the defendants in that the person who interviewed the man on their behalf and engaged him did not take up the two documents which the man produced as references. No evidence had been given of the exact nature of the documents, but from the interviewer's observations they had been satisfactory references. The man had been engaged as a car-washer, which meant as a garage hand. It was not negligent to employ a man for such a job without taking up his references. It had happened that, in the press of work, it had become necessary to put the man to the better job of driving the plaintiff. That was not negligent, because the man, having started work at the other job, had given satisfaction in it. There must be judgment for the defendants.

COUNSEL: *Birk; Alchin.*
SOLICITORS: *S. Myers & Son; G. H. Drury.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Collier *v.* Sunday Referee Publishing Co., Ltd.

Asquith, J. 9th August, 1940.

Master and servant—Wrongful dismissal—Newspaper—Plaintiff engaged by defendants as chief sub-editor—Sale of newspaper during contract period—Plaintiff not retained by purchasers—Breach of contract by defendants—Continued acceptance by plaintiff of sums equal to salary not waiver of breach.

Action for damages for breach of contract.

The plaintiff was engaged by the defendants to act as chief sub-editor of the *Sunday Referee* at a weekly salary for two years ending on the 31st August, 1940. Some fifteen months before the end of that period the defendants sold the newspaper to a company which did not take the plaintiff over as sub-editor. For some months the defendants continued to pay the plaintiff amounts equal to his salary, but he then declined to attend at their office any further, and, contending that the defendants had committed a breach of the contract by selling the newspaper, he brought this action claiming damages. The defendants contended that, so long as they paid the plaintiff his salary, he was obliged to perform such work as they might reasonably require of him, and that, therefore, by failing to attend at their office, he had repudiated the contract of employment; and that in any event he had waived any breach of contract on their part by continuing to accept salary. (*Cur. adv. vult.*)

ASQUITH, J., said that the defendant company contended that they were not bound to provide the plaintiff with work, but merely to continue to pay his salary while retaining the right to call on him to work for them, and that the contract accordingly remained alive while they continued paying this salary until November, 1939, when he himself repudiated it, so that they were relieved of any further obligation to pay him. It was true that a contract of service did not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided that a man paid his cook her wages she could not complain if he chose to take any or all of his meals out. In some exceptional cases there was an obligation to provide work; for example, where the servant was remunerated by commission, or where (as in the case of an actor) the servant bargained, *inter alia*, for publicity, and the master, by withholding work, also withheld the stipulated publicity: see *Marbé* v. *Edwardes* (*Daly's Theatre*), *Ltd.* [1928] 1 K.B. 269. The normal rule, however, was illustrated by such cases as *Lagerwall* v. *Wilkinson, Henderson & Clarke, Ltd.* (1899), 80 L.T.R. 55, and *Turner* v. *Sawdon* [1901] 2 K.B. 653, where the plaintiffs (a commercial traveller and a salesman, respectively, retained for a fixed period and remunerated by salary) were held to have no legal complaint so long as the salary continued to be paid. The employer was held not bound to supply

work to enable the employee to "keep his hand in," or to avoid the reproach of idleness. In such a case there was no breach of contract, for the plaintiff would, *prima facie*, be entitled to damages measured by the amount of the salary for the unexpired period of service, if such salary were not paid. The plaintiff's case was not one of that kind: he had not been employed to perform certain functions at large or to do work commonly done by any chief sub-editor, but to be the chief sub-editor of a specific Sunday newspaper. The defendants had destroyed the office to which they had appointed him; there was no doubt that that was a breach of contract. The sale of the newspaper in June, 1939, operated as an improper dismissal and could be treated as such by the plaintiff unless he had by some subsequent action precluded himself from treating it as such. Finally, the acceptance of sums paid as salary after the sale of the newspaper did not operate as a waiver of the defendants' breach of the original contract. The plaintiff's attitude had been consistent throughout: he claimed that the defendants had committed a breach of contract, that he was therefore no longer bound to work for them, and that the measure of damages was, subject to mitigation, the salary of which they had deprived him. He was therefore entitled to accept any sums paid as salary on account of the damages owed to him. His lordship gave judgment for the plaintiff for £666 6s. 4d. damages, and costs.

COUNSEL: *Scott Cairns; B. MacKenna.*

SOLICITORS: *Dehn & Lauderdale; Lawrance, Messer & Co.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Ex parte Lees.

Humphreys, Oliver and Croom-Johnson, JJ.
12th August, 1940.

Defence Regulations—Detention—Habeas corpus—Application adjourned.

Application for a writ of *habeas corpus*.

The applicant, Aubrey Trevor Oswald Lees, of His Majesty's Prison, Brixton, by his application asked that the court might order that a writ of *habeas corpus* should be issued, directed to the Home Secretary, Sir John Anderson, to have the applicant before the court immediately after the receipt of the writ for the consideration by the court of all the necessary matters concerning his detention in prison. In an affidavit the applicant stated and submitted, *inter alia*, as follows: He had been detained by the executive without charge or trial and therefore in a manner *prima facie* contrary to the liberties granted by the Great Charter and the Bill of Rights. He was a British subject by birth, and, since the 20th June, 1940, he had been detained in Brixton, Liverpool, and Stafford Prisons by the order of the Home Secretary. At the moment of his arrest he was given a copy of what purported to be an order whereunder he was detained. He had no means of knowing whether or not such an order had in fact been made. The order stated that whereas the Home Secretary had reasonable cause to believe that he had been or was a member of, or had furthered the objects of, an organisation in respect of which the Home Secretary was satisfied (*a*) that those in control of the organisation had had associations with persons concerned in the Government of a Power with which His Majesty was at war; and (*b*) that there was danger of the utilisation of the organisation for purposes prejudicial to the public safety, therefore, in pursuance of the powers conferred on him by reg. 18B (1A) of the Defence (General) Regulations, 1939, the Home Secretary directed that the applicant should be detained. The applicant submitted that the order was bad for ambiguity, as it was impossible to tell whether it was made on the ground that Sir John Anderson had reasonable cause to believe that he had been or was a member of an organisation or on the ground that he had reasonable ground to believe that he had furthered such an organisation. Further, the Home Secretary never had reasonable or any cause to believe that he had been a member, or had furthered the objects of, any such organisation as mentioned in reg. 18B (1A). Particulars subsequently furnished to the applicant had alleged that he had expressed pro-Fascist views; had furnished the organisation known as the British Union with materials for propaganda; had attended meetings at which Sir Oswald Mosley was present, such meetings being held for the purpose of co-ordinating Fascist and anti-Semitic activities in Great Britain, and for negotiating a peace with the leader of the German Reich; and that he had been propagating anti-British views and endeavouring to hinder the war effort in Great Britain with a view to a Fascist revolution. The applicant specifically denied those allegations, and stated that, when arrested, he was waiting to take up a Colonial Civil Service post on the Gold Coast. At a meeting of the committee charged with the duty of inquiring into his detention, he was interrogated, and his denial that he was a member of the British Union was accepted, no evidence to the contrary being adduced. He submitted that nothing in reg. 18B (1A) entitled the Home Secretary to detain His Majesty's subjects without trial for expressing in correspondence with friends the view that they did not like Jews, or a view adverse to a particular member of His Majesty's Government, which he admitted having done.

Dealing with an interlocutory observation from the Bench to the effect that the court could not go into matters of fact of the kind referred to, but could only decide whether the applicant was illegally detained, and that he could not be illegally detained if the Home Secretary had power under the regulations to detain him, counsel for the applicant referred to *R.* v. *Halliday* [1917] A.C. 260; 61 SOL. J. 443, and submitted that, if it were established that the facts on which the detention order was based did not exist, the order was invalid and the subject was entitled to his liberty. If that submission were correct, then, on the evidence at present before the court, the applicant was entitled to the writ, when the matter could be fully argued on the return.

HUMPHREYS, J., said that the court had decided to take the course, for which there was precedent, of adjourning the application so that notice might be given to the Home Secretary of the matter. If counsel for the applicant asked for the matter to be expedited, the court would consent. The applicant's solicitors should give notice of the application to the Home Secretary forthwith, and also to the Governor of Brixton Prison. The application for bail (which counsel said was made in order that the applicant should be present in court when his application was being argued) must be refused.

COUNSEL: *Gerald Gardiner.*

SOLICITORS: *Oswald Hickson, Collier & Co.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF CRIMINAL APPEAL.

R. *v.* Cobbett.

Humphreys, Oliver and Croom-Johnson, JJ.
12th August, 1940.

Murder—Manslaughter—Police officer stabbed—Prisoner previously struck with truncheon—Question of provocation.

Appeal from conviction.

The appellant, Cobbett, was convicted of murder and sentenced to death at the Central Criminal Court. On the 5th July, 1940, the appellant was lying on the grass in Hyde Park near the gun-emplacement writing on a piece of paper, when a police officer approached him in order to see what he was doing, and took the paper away from the appellant. It turned out to be an innocent document, and the officer handed it back. The appellant then got up. There were divergent accounts of what had subsequently occurred, but the appellant stabbed the officer in the thigh with a carving knife, and the blade penetrated about 5 inches into the body of the officer, who died the next day. The appellant's complaint of the summing up was that, the question having been left to the jury whether or not the officer had been acting in the lawful execution of his duty, the question of provocation should also have been left to them. There was evidence that the appellant had stabbed the officer after the latter had struck him with his truncheon, but the summing up contained no reference to the question of provocation.

HUMPHREYS, J., giving the judgment of the court, said that it had been conceded by counsel for the Crown that there were difficulties in the way of supporting the conviction of murder. It was not, however, suggested by the defence that the jury could have returned a verdict of Not guilty; it was only asked that they should return a verdict of manslaughter. Nor was it now suggested that there was not ample evidence to support the latter verdict. The judge, in his summing up, had omitted to mention the possibility that if the officer was not at the material time acting in the lawful execution of his duty, but yet was stabbed and killed, it might, on the facts of the particular case, be a question whether there was provocation. It was admitted that there was a knife in the appellant's hand at the material time, and there was certainly evidence that he received a blow on the shoulder from the police officer's truncheon before the officer was stabbed. The court, in exercise of its statutory powers, would substitute for the verdict of murder one of manslaughter and for the sentence of death one of fifteen years' penal servitude.

COUNSEL: *J. Burge; L. Byrne.*

SOLICITORS: *The Registrar of the Court of Criminal Appeal; The Director of Public Prosecutions.*

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Obituary.

MRS. BERYL FORMOY.

Mrs. Beryl Edith Rotherham Formoy (*née* Barefoot), wife of Mr. Ronald Ralph Formoy, Barrister-at-Law, died suddenly on Tuesday, 27th August, at the age of forty-four. She qualified as one of the first women solicitors, and for a time practised in the East End of London with a woman friend, also a solicitor. Mrs. Formoy, who was a Fellow of the Royal Historical Society, was joint author of a volume for the Seldon Society (Exchequer of Pleas) and the records of a Sussex Mediæval Court (Lathe Court Rolls for Hastings, 1387–1474).

BINDING OF NUMBERS.

Subscribers are reminded that the binding of the Journal, in the official binding cases, is undertaken by the publishers. Full particulars of styles and charges will be sent on application to The Manager, 29/31, Breams Buildings, E.C.4.

War Legislation.

(Supplementary List, in alphabetical order, to those published week by week in THE SOLICITORS' JOURNAL, *from the 16th September,* 1939, *to the 7th September,* 1940.)

STATUTORY RULES AND ORDERS.

E.P. 1605. **Bread** (Restriction on Sales) Order, 1940. General Licence, August 30.

E.P. 1606. **Condensed Milk** (Distribution) Order, August 31.

E.P. 1602. **Cultivation of Lands** (Agistment of Livestock) Order, August 29.

E.P. 1608/S.74. Cultivation of Lands (Scotland) (Amendment No. 3) Order, August 17.

E.P. 1607. **Dried Peas, Beans and Lentils** (Control and Maximum Prices) Order, 1940. General Licence, August 31.

No. 1601. **Export of Goods** (Control) (No. 32) Order, August 30.

E.P. 1610. **Home Grown Wheat** (Control) Order, 1939. General Licence, August 31.

E.P. 1596. **Imported Eggs** (Maximum Prices) Order, August 29.

No. 1603. **Railway.** Order, July 23, 1940. Modifying Orders Determining Reductions to be made from Standard Charges where Damageable Merchandise is carried by Railway under Owner's Risk Conditions.

E.P. 1590. **Securities (Restrictions and Returns)** (No. 2) Order, September 3.

E.P. 1566. **Timber** (Charges) (No. 2) Order, August 31.

[E.P. indicates that the Order is made under Emergency Powers.]

Copies of the above Bills, S.R. & O.'s, etc., can be obtained through The Solicitors' Law Stationery Society, Ltd., 22, Chancery Lane, London, W.C.2, and Branches.

Legal Notes and News.

Honours and Appointments.

The Lord Chancellor has appointed MR. GEORGE TREVOR KELWAY to be the Registrar of Pembroke Dock, Narberth and Haverfordwest County Courts and District Registrar in the High Court of Justice in Haverfordwest, from the 9th September. Mr. Kelway was admitted a solicitor in 1922.

The Board of Inland Revenue has appointed Mr. R. K. ROWELL to be Deputy Controller of Death Duties. Mr. Rowell was called to the Bar by Lincoln's Inn in 1915.

The Colonial Legal Service announce the following appointments:—

Mr. H. H. KINGSLEY, to be Crown Counsel, Tanganyika Territory;

Mr. C. W. V. CAREY, Puisne Judge, Nigeria, to be Puisne Judge, Straits Settlements;

Mr. A. G. FORBES, Crown Attorney, Dominica, to be Resident Magistrate, Fiji;

Mr. T. T. RUSSELL, Resident Magistrate, Fiji, to be Crown Counsel and Assistant Legal Adviser, Malaya.

Notes.

For the first time the Court of Appeal on Tuesday last delivered judgment in a refuge room in the basement of the Law Courts. The court was hearing a divorce appeal when the sirens sounded. The court immediately adjourned to the refuge room below, and there Lord Justice MacKinnon delivered judgment, remarking: "This is the first occasion on which the Court of Appeal has given judgment in such a place."

NOTICE TO CONTRIBUTORS.

The Editor will be pleased to consider for publication contributions and correspondence from any professional source upon matters of legal interest.

All contributions (including correspondence) should be typewritten and on one side of the paper only, and must be accompanied by the name and address of the contributor.

The Editor is unable to accept any responsibility for the safe custody of contributions submitted to him, and copies should therefore be retained. The Editor will, however, endeavour in special circumstances to return unsuitable contributions within a reasonable period, if a request to this effect and a stamped addressed envelope are enclosed with the manuscript.

The copyright of all contributions published shall belong to the proprietors of THE SOLICITORS' JOURNAL, and, in the absence of express agreement to the contrary, this shall include the right of republication in any form the proprietors may desire.

Wills and Bequests.

Mr. Henry Lee Ormiston, B.C.L., barrister-at-law, of Sidmouth, left £56,655, with net personalty £56,562.

Mr. Hamilton Rivers Pollock, barrister-at-law, of Erchfont Manor Wilts, left £49,371, with net personalty £16,625.

The Hon. Edward Alexander Stonor, late chief clerk and Taxing Master of Private Bills, House of Lords, left £12,964, with net personalty £11,981.

Mr. Henry Reginald Wansbrough, solicitor, of Clifton, Bristol, left £65,413, with net personalty £64,678.

Court Papers.

IN THE HIGH COURT OF JUSTICE—CHANCERY DIVISION.

EXTENSION OF TRINITY SITTINGS.

Rota of Registrars in attendance on

Date.	Court of Appeal.	Judge.
Sept. 16 ..	Ritchie	Andrews
,, 17 ..	Andrews	Ritchie
,, 18 ..	Ritchie	Andrews
,, 19 ..	Andrews	Ritchie
,, 20 ..	Ritchie	Andrews
,, 21 ..	Andrews	Ritchie

Stock Exchange Prices of certain Trustee Securities.

Bank Rate (26th October, 1939) 2%. Next London Stock Exchange Settlement, Thursday, 26th September, 1940.

	Div. Months.	Middle Price 11 Sept. 1940.	Flat Interest Yield.	‡ Approximate Yield with redemption
ENGLISH GOVERNMENT SECURITIES.			£ s. d.	£ s. d.
Consols 4% 1957 or after	FA	109½	3 13 1	3 4 7
Consols 2½%	JAJO	73½	3 8 0	—
War Loan 3% 1955–59	AO	100xd	3 0 0	3 0 0
War Loan 3½% 1952 or after	JD	101	3 9 4	3 7 11
Funding 4% Loan 1960–90	MN	112⅝	3 10 11	3 2 8
Funding 3% Loan 1959–69	AO	97⅛xd	3 1 6	3 2 8
Funding 2½% Loan 1952–57	JD	97⅛	2 16 5	2 18 10
Funding 2½% Loan 1956–61	AO	90⅝xd	2 15 1	3 2 3
Victory 4% Loan Average life 21 years	MS	110	3 12 9	3 6 6
Conversion 5% Loan 1944–64	MN	109½	4 11 4	2 1 10
Conversion 3½% Loan 1961 or after ..	AO	100	3 10 0	3 10 0
Conversion 3% Loan 1948–53	MS	101¼	2 19 3	2 16 1
Conversion 2½% Loan 1944–49 ..	AO	99	2 10 6	2 12 8
National Defence Loan 3% 1954–58 ..	JJ	101¼	2 19 3	2 17 9
Local Loans 3% Stock 1912 or after ..	JAJO	85⅞	3 9 11	—
Bank Stock	AO	329	3 12 11	—
Guaranteed 3% Stock (Irish Land Acts) 1939 or after	JJ	86½	3 9 4	—
India 4½% 1950–55	MN	107½	4 3 9	3 11 1
India 3½% 1931 or after	JAJO	91½	3 16 3	—
India 3% 1948 or after	JAJO	79½	3 15 8	—
Sudan 4½% 1939–73 Average life 27 years	FA	107	4 4 1	4 1 3
Sudan 4% 1974 Red. in part after 1950	MN	105	3 16 2	3 14 7
Tanganyika 4% Guaranteed 1951–71 ..	FA	108	3 14 1	3 1 2
Lon. Elec. T. F. Corpn. 2½% 1950–55 ..	FA	90	2 15 7	3 7 4
COLONIAL SECURITIES.				
•Australia (Commonwealth) 4% 1955–70	JJ	103	3 17 8	3 14 9
Australia (Commonwealth) 3½% 1964–74	JJ	88	3 13 10	3 17 10
Australia (Commonwealth) 3% 1955–58	AO	88	3 8 2	3 18 11
•Canada 4% 1953–58	MS	110	3 12 9	3 1 3
New South Wales 3½% 1930-50 ..	JJ	94	3 14 6	4 5 8
New Zealand 3% 1945	AO	94½	3 3 6	4 7 10
Nigeria 4% 1963	AO	104	3 16 11	3 14 9
Queensland 3½% 1950–70	JJ	93	3 15 3	3 18 1
•South Africa 3½% 1953–73	JD	99½	3 10 4	3 10 6
Victoria 3½% 1929–49	AO	95	3 13 8	4 3 8
CORPORATION STOCKS.				
Birmingham 3% 1947 or after	JJ	79½	3 15 6	—
Croydon 3% 1940–60	AO	91	3 5 11	3 12 10
Leeds 3½% 1958–62	JJ	94	3 9 2	3 13 1
Liverpool 3½% Redeemable by agreement with holders or by purchase	JAJO	92	3 16 1	—
London County 3% Consolidated Stock after 1920 at option of Corporation ..	MJSD	81	3 14 1	—
London County 3½% 1954–59	FA	100½	3 9 8	3 9 1
Manchester 3% 1941 or after	FA	79½	3 15 6	—
Manchester 3% 1958–63	AO	91½	3 5 7	3 10 10
Metropolitan Consolidated 2½% 1920–49	MJSL	97	2 11 7	2 17 5
Met. Water Board 3% "A" 1963–2003	AO	82½	3 12 9	3 14 5
Do. do. 3% "B" 1934–2003 ..	MS	84½	3 11 0	3 12 6
Do. do. 3% "E" 1953–73	JJ	88	3 8 2	3 12 7
Middlesex County Council 3% 1961–66	MS	91½	3 5 7	3 10 3
•Middlesex County Council 4½% 1950–70	MN	105½	4 5 4	3 15 4
Nottingham 3% Irredeemable	MN	80	3 15 0	—
Sheffield Corporation 3½% 1968 ..	JJ	97½	3 11 10	3 12 11
ENGLISH RAILWAY DEBENTURE AND PREFERENCE STOCKS.				
Great Western Rly. 4% Debenture ..	JJ	102	3 18 5	—
Great Western Rly. 4½% Debenture ..	JJ	108½	4 2 11	—
Great Western Rly. 5% Debenture ..	JJ	112½	4 8 11	—
Great Western Rly. 5% Rent Charge ..	FA	110½	4 10 6	—
Great Western Rly. 5% Cons. Guaranteed	MA	105½	4 14 9	—
Great Western Rly. 5% Preference ..	MA	78	6 8 2	—

• Not available to Trustees over par.

‡ In the case of Stocks at a premium, the yield with redemption has been calculated at the earliest date; in the case of other Stocks, as at the latest date.